Supreme Court, U.S.
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No. 93-923

In The

Supreme Court of the United States

October Term, 1993

JAMES R. ANDERSON,

Petitioner,

vs.

DOUGLAS COUNTY; DENNIS NAGLE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Eighth Circuit correctly hold that Petitioner failed to present evidence that the Respondents violated Petitioner's rights of substantive due process?

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STATEMENT OF THE CASE

On July 17, 1991, Petitioner Anderson contacted the Douglas County Zoning Department stating that he planned to thinspread petroleum and PCB contaminated soil on agricultural land he owned in Douglas County. The County advised Petitioner that such a land use was not a permitted use under the applicable zoning ordinances. Petitioner was told he must secure a conditional use permit to engage in such activity. Conditional use permits are granted by the Douglas County Board of Commissioners after a hearing before and recommendation from the Douglas County Planning and Zoning Commission (hereinafter "Commission"). Court of Appeals' Appendix pp. 637-651 (hereinafter "CAA"). Petitioner demanded an exemption from the conditional use permit requirements. He demanded that the County approve the land use within the next two days. He threatened to sue the County if it did not do so. CAA pp. 379-381, 386-387, 696, 819-822.

Petitioner submitted his application for a conditional use permit to the County on July 22. CAA pp. 909-912, 1050-1054. A public hearing before the Commission was held on August 6, 1991. The Commission voted to recommend denial of the permit for eight reasons, including Petitioner's failure to submit any evidence showing the proposed land use was consistent with public health, safety and welfare. CAA pp. 944-972, 978. The United States Soil Conservation Service submitted evidence that a detailed soil and drainage survey of the spreading area would need to be done to establish the suitability of the land for the proposed use. CAA p. 978.

On August 13, 1991, the Douglas County Board held a public hearing on the requested conditional use permit. Petitioner failed to attend or present any evidence. The County Board approved the Planning Commission's recommendation and denied the requested permit.

The contaminated soil was generated by a City of Minneapolis road construction project. Petitioner was contacted by Minneapolis on July 9, 1991, for potential disposal of the contaminated soil on his land. CAA p. 860. Although Petitioner and Minneapolis negotiated a price, they did not enter into any contract. Any agreement was contingent upon Petitioner obtaining local approval by the City's July 25, 1991, deadline. CAA pp. 840-841. When July 25 passed without Petitioner having obtained local approval, Minneapolis informed him that it would no longer consider his site for thinspreading. CAA pp. 842-844, 847-869.

It is not the case that the Minnesota Pollution Control Agency (hereinafter "MPCA") had approved Petitioner's project. It is not the case that only the MPCA regulates such thinspreading. Minnesota Statutes Chapters 394 and 400 give Minnesota counties explicit authority to regulate such land use. MPCA approval of thinspreading on the Petitioner's land was contingent upon compliance with applicable local zoning ordinances. CAA pp. 251, 256, 260, 594-600, 631, 635. The District Court and Circuit Court of Appeals examined local law. Both Courts held that the County has the power to regulate thinspreading within its boundaries. App. pp. A6-A7, A28-A31.

Petitioner attempts to raise an issue of fact already found against him. He contends that Douglas County was

pursuing thinspreading without proceeding under the zoning laws "invoked" against him. The District Court found that all 1991 requests to thinspread were required to obtain conditional use permits. App. pp. A4, A24.

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals correctly decided the substantive due process issue. The Court's decision does not conflict with any applicable decisions of this Court. There is no split among the circuits on the substantive due process standard. There is no need to review the Circuit Court of Appeals' decision on procedural due process and equal protection. Petitioner fails to set forth any argument supporting review. The Commerce Clause issue raised by the Petitioner is nonexistent. Petitioner's Third Amended Complaint pleaded no Commerce Clause claim.

ARGUMENT

I. THE EIGHTH CIRCUIT APPLIED THE STANDARD OF REVIEW ESTABLISHED BY THIS COURT TO PETITIONER'S SUBSTANTIVE DUE PROCESS CLAIM.

The concept of substantive due process protects individual liberty against government actions regardless of the fairness of the procedures used to implement those actions. *Daniels v. Williams*, 474 U.S. 327 (1986). In its most basic sense, what it questions is whether legislative action

bears a rational relationship to a legitimate governmental purpose. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) confirms this analysis, and concludes that it is only those legislative actions which are shown to be "clearly arbitrary and unreasonable" that violate the right of substantive due process. *Id.*, at 395.

What is "arbitrary or capricious" for purposes of protecting Constitutional rights is not necessarily the definition of the term arbitrary and capricious utilized when a state court reviews an administrative decision. Something more is necessary for an alleged deprivation of an interest protected by the Constitution to be declared arbitrary in the constitutional sense. *See, e.g., Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992). To hold government action to be constitutionally arbitrary, it is necessary to find the government action so "egregious" and "irrational" that it exceeds standards of inadvertence and mere errors of law. *Daniels v. Williams*, 474 U.S. 327 (1986); *Baker v. McCollan*, 443 U.S. 137, 147 (1979) (Blackmun, J. concurring). The Eighth Circuit utilized this standard in reviewing this case. App. p. A6; *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990).

The circuit courts are in uniformity as to the standard they apply to determine constitutional arbitrariness. The circuits look to whether the regulation in question bears some rational relationship to the exercise of a municipality's police powers. They examine the government action to determine if it so "egregious and irrational" as to exceed standards of inadvertence and mere errors of law. *See Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th

Cir. 1992)[1]; *Jacobs, Visoncsi and Jacobs, Co. v. City of Lawrence,* 927 F.2d 1111 (10th Cir. 1991); *Edie v. Sarasota County,* 908 F.2d 716 (11th Cir. 1990), cert. denied, 111 S. Ct. 1073 (1991); *Southern Pac. Transp. Co. v. City of Los Angeles,* 922 F.2d 498 (9th Cir. 1990), cert denied, 112 S. Ct. 382 (1991); *Harding v. County of Door,* 870 F.2d 430 (7th Cir.), cert. denied, 493 U.S. 853 (1989); *Silverman v. Barry,* 845 F.2d 1072 (D.C. Cir.), cert. denied, 488 U.S. 956 (1988); *Brady v. Town of Colchester,* 863 F.2d 205 (2d Cir. 1988); *Shelton v. City of College Station,* 780 F.2d 475 (5th Cir.) (en banc), cert. denied, 477 U.S. 905, and cert. denied, 479 U.S. 822 (1986); *Scott v. Greenville County,* 716 F.2d 1409 (4th Cir. 1983).

II. THE EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY DECIDED THE SUBSTANTIVE DUE PROCESS ISSUE PRESENTED.

This case is not appropriate for an exercise of the Court's discretionary review. The Eighth Circuit Court of Appeals correctly decided the substantive due process issue. Under the facts and law, there can be no other result.

A municipal government has the power to regulate the development and use of land. Local governments have broad powers in the areas of land use and zoning.

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[1] The *Pearson* opinion is in accord with the Eighth Circuit and the other Circuits on this issue, notwithstanding Petitioner's assertion to the contrary. Petitioner elevates form over substance, narrowly focusing on specific words used by different courts to describe the analysis undertaken, rather than examining the effect and import of the analysis.

Schad v. Bourough of Mount Ephraim, 452 U.S. 61 (1981). The exercise of that power is an essential aspect of achieving a satisfactory quality of life in both rural and urban communities. *Id.* The establishment of zoning districts with permitted and conditional uses is not an arbitrary and capricious act of constitutional significance. *Euclid* affirmed the appropriateness of such districts.

It is not illogical or arbitrary to require Petitioner to comply with the Douglas County zoning ordinance. Petitioner demanded that permission to thinspread be granted in two days. However, the public hearing process required for issuing a conditional use permit requires a minimum of ten days and up to two months to run its course. The zoning ordinance and laws of Minnesota grant the County the power to regulate this land use. The County's requirement that Petitioner go through the permit process bears a rational relationship to the requirements of law. It is not arbitrary and capricious in the constitutional sense.

The County denied the requested permit. The record reflects that Petitioner presented no evidence to establish that the proposed use was consistent with public health, safety and welfare. CAA pp. 944-972, 987. Petitioner characterized any person opposing his application as a "lunatic left-wing environmentalist", and belittled the public's legitimate concerns regarding potential PCB contamination. *Id.* The record does not support any decision other than a denial of the application. The Eighth Circuit correctly held there was no evidence to support Petitioner's claim of a violation of his constitutional right of substantive due process. This Court should therefore deny the Petition for Writ of Certiorari.

III. PETITIONER FAILS TO SET FORTH ANY REASON JUSTIFYING THIS COURT'S REVIEW OF THE ISSUES OF PROCEDURAL DUE PROCESS, EQUAL PROTECTION AND COMMERCE CLAUSE.

Petitioner presents no reason for the Court to examine his claims of violation of procedural due process, equal protection and the Commerce Clause of the United States Constitution. While they are raised in Petitioner's Question Presented for Review, no further reference to the issues is made in his Petition. An examination of the Appendix reveals why. There are no special or important reasons for such review. There is no conflict among the various Circuit Courts of Appeal as to the standards to apply to the claims of due process and equal protection. The Eighth Circuit Court of Appeals applied the accepted standards in ruling on these issues.

Petitioner's request that this Court review an alleged violation of the Commerce Clause of the United States Constitution must similarly be denied. That issue is not properly before the Court. Petitioner's Third-Amended Complaint, the pleading on which judgment was granted, contains no allegation of a violation of the Commerce Clause.

CONCLUSION

For all of the reasons stated above, this Court should deny the Petition for Writ of Certiorari.

Dated: January 10, 1994

Respectfully submitted,

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